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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1975

No. 75-1766

STANLEY FLEISHMAN,

Petitioner,

vs.

EVERETT ARTHUR McFEE
and JACK C. GREENLEES,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION FIVE.

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Respondents, Everett Arthur McFee and Jack C. Greenlees, pray that a writ of certiorari not issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five, entered in the above-entitled case on December 29, 1975.

OPINION BELOW

The opinion of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five is unreported.

JURISDICTION

The judgment of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five was entered on December 29, 1975. Petition for rehearing was filed with the Court of Appeal and denied on January 28, 1976. A petition for hearing by the California Supreme Court was denied on March 10, 1976. The judgment of the Court of Appeal is therefore the final judgment of "the highest court of a State in which a decision could be had." The jurisdiction of this Court was invokved under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The questions presented are stated in four points by the Petitioner in his Brief. We believe their characterization

in particular, question 4 is incorrect and that the record is quite strong as to the evidence of Petitioner's statement.

1. Whether the court below erred in holding that proof of ill will, hatred and animosity is admissible in a defamation action brought by public officials against petitioner, an attorney, for alleged defamatory statements made during a public address, the case being concededly governed by the standards of the First and Fourteenth Amendments and the interpretive opinions of the Court in New York Times v. Sullivan, 376 U.S. 254, 11 L.ed.2d 686, 84 S.Ct. 710 and related decisions.

2. Whether the court below erred in holding that proof of ill will, hatred and animosity is admissible in a case governed by the First and Fourteenth Amendments and New York Times v. Sullivan to "help prove" the requisite actual malice.

3. Whether the court below erred in reversing the judgment of non-suit when the trial judge held, as a matter of order of proof, that in a case governed by the First and Fourteenth Amendments

and New York Times v. Sullivan, the public officials were required to first prove actual malice before evidence of ill will, hatred and animosity could be offered.

4. Whether, contrary to the provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court in New York Times v. Sullivan and related cases, the court below erred in reversing the judgment of non-suit when the record is devoid of any evidence, clear or convincing, that petitioner made any defamatory statements concerning respondents with requisite actual malice.

STATEMENT OF THE CASE

1. Everett Arthur McFee (McFee) and Jack C. Greenlees (Greenlees) filed a first amended complaint (complaint) for damages for slander against Stanley Fleishman (Fleishman). The complaint alleged that McFee and Greenlees were Deputy Sheriffs of Los Angeles County; that on February 1, 1968, they read a newspaper story to the effect that on February 8, 1968, Fleishman would make

a speech at the Oakwood Upper School on the subject "Censorship and the Sexual Revolution and 'The Beard'"; that McFee, in keeping with his assignment to the Los Angeles County Sheriff's Vice-Bureau, purchased a ticket and accompanied by Greenlees attended the lecture which was attended by approximately fifty other persons; that at said lecture, Fleishman pointed at McFee and Greenlees, calling them by name and stating that they were examples of the "unlawful facist police state and their sole purpose in being at the meeting is to harass and intimidate" Fleishman and the other citizens present. The complaint alleged that Fleishman also stated: "Sergeant McFee and his friend (Greenlees) spend their time going around peeking in citizens windows trying to catch a man and his wife having an orgasm so that they could make a crime out it it" and "these fellows go around planting things on people so that they can make a crime out of it and arrest them." The complaint alleged that Fleishman "intended by the foregoing statement for the audience to believe

that your plaintiff and Mr. Greenlees planted evidence or contraband on people so that your plaintiff and Mr. Greenlees could arrest these people as criminals when they were actually innocent persons. That he intended to make the audience believe that your plaintiff and Mr. Greenlees would frame evidence and unlawfully, thereby, obtain convictions of innocent persons." The complaint also quoted Fleishman as stating that McFee and Greenlees used language "in public" which was fouler than that used in "The Beard" specifying the language and that Fleishman, in effect, accused McFee and Greenlees of being guilty of a crime of stealing evidence seized in obscenity cases and using it for their own personal purposes. Fleishman also stated that McFee and Greenlees "never obtained a conviction that stood up, but in their fury continued to intimidate people" and other statements indicated that McFee and Greenlees were not doing their job as Deputy Sheriffs, but were merely intimidating people while on the public payroll. The complaint alleged that Fleishman's statements were untrue;

that they were made with intent to injure, defame and disgrace McFee and Greenlees; that they were made maliciously and the malice and desire to vex, harass, annoy and injure McFee and Greenlees, and proximately caused damages in the sum of $100,000.00. The complaint sought punitive damages in the sum of $200,000.00. Fleishman's demurrer was overruled and he answered. A jury was impanelled and after four days of trial, Fleishman's motion for judgment of nonsuit was granted and a judgment of nonsuit was entered.

2. During the trial, Greenlees testified (R.T. p.73)[1/] that he was a Deputy Sheriff of Los Angeles County; and that he had been acquainted with Fleishman since the latter part of 1957. That Greenlees' primary duties and responsibility were the investigation of alleged obscenity including motion pictures,

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1/ The reference R.T. is to the Reporters Transcript on appeal to the Court of Appeal below.

magazines, pocket books, live shows, and arcade-type entertainment.

That on February 8, 1968, while McFee and Greenlees were attending that talk given by Fleishman, Fleishman stated, "I guess you're here to -- bug me or to bug my speech." He (Fleishman) had an expression as if he were upset about McFee and Greenlees presence (R.T. p. 80, lines 10-11).

During the talk, Fleishman stated,

> ". . . that he would have changed his talk in any event due to the fact that two vice squad cops were sitting there, and he, at that time, pointed to us, and he called me by name. He said, 'One of them is Sergeant Greenlees,' and he -- he said, 'I -- I can't recall the other fellow's name right now,' but he said, 'What's important is that they are here for one purpose, and that is to harass and intimidate the audience here and harass and intimidate me.'" (R.T. p.82, lines 2-19).

During the course of the speech Fleishman stated to the audience that,

"These fellows go around planting things on people so they can make a crime out of it and arrest them" (R.T. p.85, line 4-6). And in response to a question, "What happens to all of this evidence or obscene matter that these officers confiscated?", Mr. Fleishman replied, "I don't know. A lot of it has a way of disappearing. Why don't we ask these fellows here to explain themselves" (R.T. p.85, lines 34-37). Fleishman gesturing toward McFee and Greenlees when he made the comment (R.T. p.85, lines 9-10).

The audience, after these statements of Fleishman's made derogatory comments and sounds of approbation directed towards Plaintiffs (R.T. p.86, lines 5-15).

Greenlees testified that during his career he did not plant evidence on anyone or frame anyone, and that such conduct would be a felony under the Penal Code of the State of California. He further testified that he had never stolen evidence, and that to do so would also be a felony in California (R.T. p.86).

McFee and Greenlees' attorney made an offer of proof.

"At this time I offer to prove a continuous course of conduct showing animosity between the parties, animosity by Mr. Fleishman, the defendant, direct at this Plaintiff, threats, accusations, specific threats, such as, 'I'll sue you. I'll get you. I'll do you,' which I equate to the statement in case the Kapellas v. Kofman, 81 Cal.Rptr. 360, which has heretofore been cited in this record, of 'I'll dig up all the dirt I can about you and print it.'" Also see R.T. p.91, lines 26-28, and p.92, lines 1-15.

The Trial Judge did not allow the offer of proof.

On March 29, 1973 Fleishman's counsel stated,

"We abandon that defense, and we rely solely on the defense that statements were not made and on the privilege under the First Amendment to the Constitution of the United States, as defined in New York Times Co. v. Sullivan, 376 US 254, 11 L.ed.2d 686, 84 S.Ct. 710, and the following cases." (R.T. p.101, lines 22-25).

The trial Judge determined that Deputy Sheriffs are public officials of a lesser category (R.T. p.103). He stated that the evidence offered by Plaintiffs would not be admitted under the case of New York Times v. Sullivan, supra, and further stated that the case of Kapellas v. Kofman, supra, was inapplicable (R.T. pp.104-105, also see R.T. p.107, line 3-10).

Fleishman was called as a witness for examination under § 776 of the California Evidence Code. Fleishman denied making statements that McFee and Greenlees plant evidence on people, and denied making that statement that they steal or take evidence and keep it for their own personal purposes. He stated that he did have such a belief and that on February 6, 1968, believed that McFee planted evidence in the case of Haddad, specifically a manuscript called, "The Devil's Advocate" (R.T. p.118, lines 6-23; also see R.T. p.120, lines 1-8).

Further testimony of Fleishman indicated that he had no specific knowledge of any evidence planted by Greenlees

R.T. p.121, lines 6-15). Fleishman stated that McFee had been an investigating officer on the Haddad case in which matter Fleishman had represented Haddad. Haddad has been convicted of a felony after a jury trial. Haddad was alleged to have stated to Mr. Fleishman that McFee had planted materials which enabled the police to go into the building and convict Haddad (R.T. p.125A, lines 8-28; p.125B, lines 2-15).

On redirect examination Fleishman testified at length as to the substance of his speech and reasons for his various beliefs regarding vice officers.

A stipulation was made that McFee would testify that he did not plant any evidence or frame anyone in any way, that he did not steal any evidence or take any evidence improperly at any time (R.T. p.224, lines 2-20; C.T. p.72).

James J. Clancy, former Deputy District Attorney, testified to the effect that he was the prosecutor in the case where Haddad was defended by Fleishman. That Haddad was convicted of a felony and went to State Prison. Further, that

Haddad prior to that particular prosecution had a criminal record. The alleged plant of the manuscript, "The Devil's Advocate", was found in a garbage bin and a printer named Graham testified that he had put it there (R.T. p.241, lines 13-28; p.242, lines 1-22).

Clancy testified in depth as to Graham's testimony at trial regarding Haddad and McFee, and that Fleishman had been present and cross-examined Mr. Graham. Clancy further testified that he had formed a personal opinion of Fleishman's character for truth and veracity and that it was bad. He further stated that in obscenity matters he would not believe Fleishman's testimony under oath (R.T. p.251, lines 20-28; p.29; p.30, lines 1-16; C.T. p.73). 2/

At various times during the trial, counsel for McFee and Greenlees was precluded by the trial judge from introducing the additional matters involving Fleishman's conduct and statements with regards to McFee and Greenlees. That included testimony regarding prior law suits, threats made by Fleishman to McFee

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2/ The reference C.T. is to the Clerk's Transcript on appeal to the Court of Appeal below.

and Greenlees, and quotes of Fleishman - "you'll just have to learn and be stopped like the rest of the cops", "I'm going to ruin you, don't you talk to my client" (C.T. pp.49-54). Fleishman also allegedly stated, "You get out of that place or I'll do you!", which was a threat of murder or mayhem (C.T. p.54). Further, Fleishman was alleged to have made the additional statement, "These are examples of the unlawful fascist police state, these cops" (R.T. p.14, lines 16-17). "They spend their time going around peeping in people's windows, trying to find a married person having an orgasm so they can make a crime out of it" (R.T. p.14, lines 18-21).

DISCUSSION OF QUESTIONS PRESENTED

1. At the time of trial, Greenlees had been in the sheriff's office for twenty-five years, nineteen of which had been in investigation of crimes, commonly referred to as vice. McFee did not testify at trial, but in an affidavit he averred that he was a sergeant assigned to the Los Angeles Sheriff's Vice-Bureau

and had been so assigned since 1958. McFee and Greenlees' superior, Captain Bloc, directed them to attend Fleishman's speech. Attending speeches on the subject of obscenity and censorship were part of their routine duties.

In the landmark case of New York Times v. Sullivan, supra, the court said:

> "We have no occasion here to determine how far down the ranks of government employees the 'public official' designation would extend . . ." (Supra at p.283, n.23).

Since that decision the court has never expressly defined the categories of persons who would or would not be included. However, in Time Inc. v. Pape, 401 U.S. 279, 284 (28 L.ed.2d 45, 91 S.Ct. 633), the court accepted the determination of the lower court that the deputy chief of detectives and a lieutenant of police of the Chicago Police Department were public officials.

In Rosenblatt v. Baer, 383 U.S. 76 (15 L.ed.2d 597, 865 S.Ct. 669), the Supreme Court established some guidelines

for defining who can be classified as a public official.

"It is clear, therefore, that the public officials designation applies at the very least to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over government affairs . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . the New York Times malice standards apply." (Emphasis added.) (Supra, pp.85-86).

The Court of Appeal of the State of California stated, "that police officers are government employees. As police officers, McFee and Greenlees clearly had 'substantial responsibility for or control over government affairs', especially while acting in their official capacity in the area of the enforcement of obscenity laws. Their presence at Fleishman's speech was in the performance of those

public duties; in that performance they were public officials."

The Trial Judge determined that Greenlees and McFee were public officials of a lesser category (R.T. p.103).

In California, cases involving defamation of public officials have concerned themselves mainly with an interpretation of Civil Code § 47(3), rather than with the precise question of who is a public official. The Civil Code provides:

> "A privileged publication or broadcast is one made . . .3. in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." (West's Civ. Code, § 47 (1954).)

The rationale for this Civil Code section was stated in Jones v. Express Publishing Co., 87 Cal.App. 246, 255:

"The doctrine of privileged communications rests essentially upon the public policy. Under the proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false."

In Williams v. Daily Review Inc., 236 Cal.App.2d 405, 416-417, the court stated that the "Fair comment" privilege, as contained in Civil Code § 47 allows a person to make "fair comment" on matters of public interest. In discussing that Civil Code section the court said:

"The crucial issue involved in determining the application of the 'fair comment' privilege is whether or not the publication is made in the public interest."

From these authorities, it seems evident that the California courts have extended the privileged comments to not

only a person who is a public official, but also to matters of public interest. (See "Defamation of a Public Official", 1 U.S.F.L.R. 356).

In the case of New York Times v. Sullivan, supra, the Supreme Court said that in order for a public official to recover damages for defamation, it must be proven that the statements made about that official were made with "actual malice", i.e., "knowledge that it was false or with reckless disregard of whether it was false or not." (Supra, p.280-281). The problem presented in this case is whether or not evidence of "ill-will malice" may be admitted to prove the New York Times "actual malice" standard. It is clear that any California requirement for proof of malice in a statement made regarding a public official involved in an area of public interest must also meet the constitutional standards enunciated in New York Times, supra. But, in the New York Times case, the Supreme Court did not go so far as to prescribe the particular way in which a plaintiff in a defamation action in a state court must

plead (or prove) "actual malice." (Noonan v. Rousselet, 239 Cal.App.2d 477).

In Kapellas v. Kofman, 1 Cal.3d 20, the California Supreme Court, in reversing an order sustaining a demurrer to a libel complaint regarding a public official, held that detailed facts of ill-will malice as alleged in plaintiff's complaint were sufficient to sustain the pleadings on the constitutional requirements of malice. There the court allowed evidence of "ill-will malice" to be pled, while recognizing that "the proof of malice must not only satisfy the requirements of (California) statutory privilege but must, of course, meet the demands of the federal constitution." (Kapellas v. Kofman, supra at p.28 n.6.)

At trial, in the case at bar, McFee and Greenlees tried to introduce evidence of "ill-will" malice which existed between Fleishman, McFee and Greenlees. The trial judge stated that the evidence would not be admitted under New York Times v. Sullivan, supra, and stated that the case of Kapellas v. Kofman, supra, was inapplicable.

In Mullins v. Brando, 13 Cal.App.3d 409, 419-420, the court found that the plaintiffs' allegations that "said statement and publication was made by defendants with evil motive and malice, willfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with a wanton and reckless disregard for the truth or falsity of the statements made" were sufficient to sustain the pleading. There the court found that those allegations went directly to the issue of reckless disregard of the truth. (Supra, p.421.)

"Reckless disregard cannot be fully encompassed in one infallible definition." (St. Amant v. Thompson, 390 U.S. 727, 730 (20 L.ed.2d 262, 88 S.Ct. 1323).) There are no limits as to what may be pled to prove reckless disregard. Since the California courts allow "ill-will malice" to be pled in both Mullins, supra, and Kapellas, supra, evidence supplying proof of those allegations should be admissible at trial. If that evidence of "ill-will malice" would be admissible as indicated in the above cases, then it should have been admissible in the trial of the case

at bar. Although under United States Constitutional standards, ill-will malice cannot be the only basis for a finding of malice in cases involving public officials (Garrison v. Louisiana, 379 U.S. at p.73), we hold that evidence of ill-will malice can be introduced to help prove the New York Times standard of "reckless disregard".

McFee and Greenlees were entitled to introduce evidence of the "ill-will malice" between Fleishman and themselves to prove that Fleishman made his statements with reckless disregard for the truth. Because they were denied this opportunity, the case was reversed by the Court of Appeal of the State of California. Malice was a jury question. (Alioto v. Cowell Communications, Inc., 519 Fed.2d 777.)

2. A real question exists as to the controlling nature of the decision in the case of New York Times Co. v. Sullivan, supra, and the later cases exemplified by Rosenbloom v. Metromedia, Inc., 403 U.S. 24, 30 (1971). In the case of New York Times Co. v. Sullivan, supra, the Supreme Court dealt with a

plaintiff who was a public official, and with a defendant that was a media publisher or broadcaster. Rosenbloom v. Metromedia, supra, was a plurality decision against a media defendant which as allowed media defendants to apply the rule in the case of New York Times Co. v. Sullivan, supra, against private plaintiffs involved in an area of public interest.

The decision of the case of New York Times Co. v. Sullivan, supra, that had made the Rosenbloom case expansion inevitable. It should be noted that Rosenbloom v. Metromedia, supra, was a plurality decision and not binding on the lower courts. (United States v. Pink, 315 U.S. 203, 216 (1941).) Further, the decision in the case of New York Times Co. v. Sullivan, supra, was not based on the First Amendment blanketly countenancing all libels. Rather the First Amendment protection was given to media defendants on the historical basis that the First Amendment was intended to forbid actions for seditious publications. See Kalven, The New York Times Case:

A Note on "The Central meaning of the First Amendment" 1964, S.Ct. Rev. 191, 208, 209.

The facts of this case indicate that Fleishman, an attorney, was scheduled to give a speech pertaining to obscenity and who thereupon decided upon viewing McFee and Greenlees in the audience, proceeded to direct a substantial portion of his speech towards charging McFee and Greenlees with the commission of felonies during their work as law enforcement officers. Fleishman can in no way be considered a media publisher or broadcaster, and his speech in which libelous statements were made is not to be countenanced under the case of New York Times v. Sullivan, supra.

There is no evidence that McFee and Greenlees ever discussed obscenity with the press. They were not thrust into the vortex of this public issue by their actions. Nor did they engage the public's attention in an attempt to influence either public opinion or the judicial or legislature.

Defamatory statements by Fleishman, an attorney, were designed to influence

the public on unrelated and unfounded charges, to the effect that the officers plant evidence and that evidence has disappeared under the officer aegis made it difficult at best for police officers to properly service their communities. Neither New York Times v. Sullivan, supra, nor do the other cases prior to Gertz v. Robert Welch, Inc., 94, S.Ct. 2997 (1974), countenance those libels.

Under Gertz v. Robert Welch, Inc., supra, the plaintiffs are not deemed "public person." The standard for a "public person" is,

"For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. Most commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." (Gertz v. Robert

welch, Inc., supra, pp.3009-10).

The facts show that McFee and Greenlees are not public persons set forth in Gertz v. Robert Welch, Inc., supra. They have no general fame or notoriety and no pervasive involvement in the affairs of society.

McFee and Greenlees under Gertz v. Robert Welch, Inc., supra, are not public officials. In Gertz v. Robert Welch, Inc., supra, it was claimed that Gertz having served on a housing committee, having appeared at a coroner's inquest, and being a lawyer and an officer of the court would make him a public official. The court in Gertz v. Robert Welch, Inc., supra, stated that we should not distort the plain meaning of the term "public official" beyond all recognition (Gertz v. Robert Welch, Inc., p.3012).

The court in Gertz v. Robert Welch, supra, only requires a showing of negligence as contracted with a showing of willful or reckless disregard as set forth in New York Times Co. v. Sullivan, supra. (Gertz v. Robert Welch, Inc., p.3014).

From the foregoing discussion we

respectfully submit that McFee and Greenlees were denied the opportunity to present detailed facts of "ill-will malice" in helping to prove the New York Times standard of "Reckless disregard". The California statutory privilege imposes a stricter standard on McFee and Greenlees than the demands of the Federal Constitution. It is further submitted that there are decisional questions which we believe indicated that the New York Times v. Sullivan, supra is inapplicable. In our view, the decision of the Court of Appeal in reversing the trial court ruling was proper.

CONCLUSION

For the foregoing reasons the writ of certiorari to review the Judgment and opinion of the Court of Appeal for the State of California in and for the Second Appellate District, Division Five should be denied.

Respectfully submitted,

FRANKLIN BELL GASSMAN
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